

DECISION

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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

BEST DOCUMENT AVAILABLE

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FILE: 8-181223

DATE: JUL 29 1974

MATTER OF Robert A. Remes - [Retroactive appointment]

DIGEST: Employees, placed in lower grade at time of appointment than they would have been placed in had there not been an administrative failure to carry out a nondiscretionary agency policy, may have their appointments retroactively changed to the higher grade and paid appropriate back pay. While general rule is that retroactive changes in salary may not be made in absence of a statute so providing, GAO has permitted retroactive adjustments in cases where errors occurred as the result of a failure to carry out a nondiscretionary administrative policy. See Comp. Gen. decs. cited.

This matter involves a request from the United States Federal Labor Relations Council for authority to make retroactive appointments, with appropriate back pay, to correct administrative errors which occurred in the hiring of two employees of the Council, namely Mr. Robert A. Remes and Mr. Robert P. Hermann. In the case of Mr. Remes, authorization is sought to make his appointment to GS-11, step 1, retroactive to August 5, 1973, the date he was first appointed and to pay retroactive salary equivalent to the difference between the salary of GS-9, step 1, and GS-11, step 1, for the period from August 5, 1973, through December 8, 1973. In the case of Mr. Hermann, authorization is sought to make his GS-11 appointment retroactive to August 13, 1973, the date of his appointment and to pay retroactive salary equivalent to the difference between the salary of GS-9, step 1, and GS-11, step 1, for the period from August 13, 1973, through December 22, 1973.

The record indicates that at the time they were first hired by the Council, Mr. Remes and Mr. Hermann were appointed to positions classified as Law Clerk (Trainee), GS-904, at Grade 9, step 1. The Executive Director of the Council states that at the time the employees were interviewed, selected and appointed to their positions, there was a nondiscretionary agency policy in effect which provided that attorney-advisors and law clerk trainees were to be hired at a GS-11, step 1, level if they met the criteria of Federal Personnel Manual Chapter 930, subchapter 3-3(b)(2). Both Mr. Remes and Mr. Hermann met the criteria of that subchapter. The Executive Director further states: "It is clear that, had there not been a misunderstanding as to the FPM criteria

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and the eligibility of Mr. Remes and Mr. Hermann thereunder, both would have been originally appointed at the GS-11, step 1 level." Although Mr. Remes and Mr. Hermann were appointed at the GS-9, step 1, level, they nevertheless performed the duties and responsibilities of the GS-11 entrance level attorney position from the date of their initial appointments.

Subsequently, the fact that an administrative error had been made in the original appointments of Mr. Remes and Mr. Hermann concerning their eligibility for appointment at the higher grade was brought to the attention of the Executive Director and immediate corrective action was taken to change the grades of the two employees to GS-11. Authority is now sought to make the corrective actions retroactive to the dates of their original appointments.

We discussed the general rule regarding retroactive salary changes in our decision of January 22, 1970, B-168715, as follows:

"As a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 id. 583 (1960), 40 id. 207 (1960). However, we have permitted adjustments (retroactively effective) of salary rates in certain cases when errors occurred in failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955) and 39 id. 550 (1960). Also, we have permitted retroactive adjustments in cases where the administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 369, 376 (1941), 37 id. 300 (1957), 37 id. 774 (1958)."

Subchapter 2-7c of chapter 531 of the Federal Personnel Manual pertaining to determining rate of basic pay provides as follows:

"c. Administrative error. When an administrative error is made in determining the correct pay attaching to a position or payable to an employee, correction of the administrative error may be made on a retroactive basis."

In the cited decision, B-168715, January 22, 1970, it was held that the employees involved in that case had no vested right to be promoted at any specific time, but rather that the agency's regional commissioner

was given the authority to promote. We recognized in that case that the intent of the administrative instructions involved was that the promotion be made within a reasonable time, but that a delay in effectuating the promotions was, in effect, not administrative error. In the present case, however, it appears that the Federal Labor Relations Council's administrative policy was not to make a newly-hired attorney merely eligible to receive a GS-11 salary, but instead to require such grade and pay if the appropriate FPM criteria were met. It does not appear that it was intended, once a decision was made to offer an attorney applicant a position, that there was to be any discretion as to the grade to be offered.

Accordingly, and in view of the statement by the Executive Director that Mr. Remos and Mr. Hermann would have been originally appointed at the GS-11 level had there not been an administrative error in the interpretation of the FPM criteria and the eligibility of the employees thereunder, we would have no objection to the Council effecting the proposed retroactive appointments and paying the appropriate back pay.

R.F.KELLER

Deputy, Comptroller General
of the United States